

PROFESSIONAL SERVICES CONTRACT

SE 3rd Street Gravity Sewer Feasibility Study

THIS AGREEMENT is between the City of Newport, an Oregon municipal corporation (City), and Brown and Caldwell, Inc., a California corporation, which is registered to practice civil engineering in the State of Oregon (Consultant).

RECITALS

- A. Pursuant to City Rule 137-048-0200, the City chose to direct appoint for professional consulting services to assist the City in the SE 3rd Street Gravity Sewer Feasibility Study.
- B. Consultant is willing and qualified to perform such services.

TERMS OF AGREEMENT

1. Consultant's Scope of Services

Consultant shall perform professional consulting services related to the SE 3rd Street Gravity Sewer Feasibility Study, as described in the attached Exhibit A. The City is free to utilize other consultants as it deems appropriate.

2. Effective Date and Duration

This agreement is effective on execution by both parties and shall expire, unless otherwise terminated or extended, upon completion of all services included in Exhibit A. The parties may extend the term by mutual agreement.

3. Consultant's Fee and Schedules

A. Fee

Fees for services under this Agreement shall be based on time and materials and pursuant to the rates shown in Exhibit B, up to a maximum amount payable of \$29,185.00. Consultant may increase the rates shown in Exhibit B on an annual basis, subject to the written approval of the City. Consultant will alert the City when Consultant is increasing its fees. Consultant will bill for progress payments on a monthly basis. In order to determine the maximum monetary limit for each task, Consultant will submit a schedule and a labor hour estimate based on the rates shown in Exhibit B. Consultant will invoice monthly progress payments based on actual time worked on the project. The maximum monetary limit will not be exceeded without prior written approval by the City. Projects partially completed may be paid for in proportion to the degree of completion.

Consultant will be reimbursed for direct charges such as the cost of printing, postage, delivery services, and subconsultant fees. Unless specifically noted in the Agreement, direct charges will be billed at cost without any markup. Office expenses such as computer cost, telephone calls, and overhead expenses are incidental and are included in the hourly rates shown in Exhibit B.

B. Payment Schedule for Basic Fee

Payments shall be made within 30 days of receipt of monthly billings based on the work completed. Payment by the City shall release the City from any further obligation for payment to the Consultant for service or services performed or expenses incurred as of the date of the statement of services. Payment shall be made only for work actually completed as of the date of invoice. Payment shall not be considered acceptance or approval of any work or waiver of any defects therein.

C. Payment for Contingency Tasks

When agreed to in writing by the City, the Consultant shall provide services described as Contingency Tasks in a Task Order.

D. Certified Cost Records

Consultant shall furnish certified cost records for all billings to substantiate all charges. Consultant's accounts shall be subject to audit by the City. Consultant shall submit billings in a form satisfactory to the City. At a minimum, each billing shall identify work completed during the billing period, percentage of work completed to date, and percentage of budget used to date for each task.

E. Identification

Consultant shall furnish to the City its employer identification number.

F. Payment – General

- 1) Consultant shall pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167.
- 2) Consultant shall pay employees at least time and a half pay for all overtime worked in excess of 40 hours in any one week except for individuals under the contract who are excluded under ORS 653.010 to 653.261 or under 29 USC sections 201 to 209 from receiving overtime. Any subcontractors utilized by Consultant under this Agreement will be paid according to the then prevailing wage.
- 3) Consultant shall promptly, as due, make payment to any person, co-partnership, association or corporation, furnishing medical, surgical and hospital care or other needed care and attention incident to sickness or injury to the employees of Consultant or all sums which Consultant agrees to pay for such services and all moneys and sums which Consultant collected or deducted from the wages of employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service.
- 4) Consultant shall make payments promptly, as due, to all persons supplying services or materials for work covered under this contract. Consultant shall not

permit any lien or claim to be filed or prosecuted against the City on any account of any service or materials furnished.

- 5) If Consultant fails, neglects or refuses to make prompt payment of any claim for labor, materials, or services furnished to Consultant, sub-consultant or subcontractor by any person as such claim becomes due, City may pay such claim and charge the amount of the payment against funds due or to become due to the Consultant. The payment of the claim in this manner shall not relieve Consultant or its surety from obligation with respect to any unpaid claims.

G. Schedule

Consultant shall complete services under this Agreement in accordance with the proposed schedule (Exhibit C).

4. Ownership of Plans and Documents: Records; Confidentiality

A. Definitions. As used in this Agreement, the following terms have the meanings set forth below:

- 1) Consultant Intellectual Property means any intellectual property owned by Consultant and developed independently from this Agreement that is applicable to the Services or included in the Work Product.
- 2) Third Party Intellectual Property means any intellectual property owned by parties other than City or Consultant that is applicable to the Services or included in the Work Product.
- 3) Work Product means the Services Consultant delivers or is required to deliver to City under this Agreement. Work Product includes every invention, discovery, work of authorship, trade secret or other tangible or intangible item and all intellectual property rights therein, and all copies of plans, specifications, reports and other materials, whether completed, partially completed or in draft form.

B. Work Product

- 1) Except as provided elsewhere in this Agreement, all Work Product created by Consultant pursuant to this Agreement, including derivative works and compilations, and whether or not such Work Product is considered a "work made for hire" or an employment to invent, shall be the exclusive property of City. City and Consultant agree that such original works of authorship are "work made for hire" of which City is the author within the meaning of the United States Copyright Act. To the extent that City is not the owner of the intellectual property rights in such Work Product, Consultant hereby irrevocably assigns to City any and all of its rights, title, and interest in all original Work Product created pursuant to this Agreement, whether arising from copyright, patent, trademark, trade secret, or any other state or federal intellectual property law or doctrine. Upon City's

reasonable request, Consultant shall execute such further documents and instruments necessary to fully vest such rights in City. Consultant forever waives any and all rights relating to original Work Product created pursuant to this Agreement, including without limitation, any and all rights arising under 17 USC §106A or any other rights of identification of authorship or rights of approval, restriction or limitation on use or subsequent modifications.

- 2) In the event Consultant Intellectual Property is necessary for the use of any Work Product, Consultant hereby grants to City an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use Consultant Intellectual Property, including the right of City to authorize contractors, Consultants and others to use Consultant Intellectual Property, for the purposes described in this Agreement.
- 3) In the event Third Party Intellectual Property is necessary for the use of any Work Product, Consultant shall secure on City's behalf and in the name of City, an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the Third Party Intellectual Property, including the right of City to authorize contractors, Consultants and others to use the Third Party Intellectual Property, for the purposes described in this Contract.
- 4) In the event Work Product created by Consultant under this Agreement is a derivative work based on Consultant Intellectual Property or is a compilation that includes Consultant Intellectual Property, Consultant hereby grants to City an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the pre-existing elements of Consultant Intellectual Property employed in the Work Product, including the right of City to authorize contractors, Consultants and others to use the pre-existing elements of Consultant Intellectual Property employed in a Work Product, for the purposes described in this Agreement.
- 5) In the event Work Product created by Consultant under this Agreement is a derivative work based on Third Party Intellectual Property, or a compilation that includes Third Party Intellectual Property, Consultant shall secure on City's behalf and in the name of City an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the pre-existing elements of the Third Party Intellectual Property, including the right to authorize contractors, Consultants and others to use the pre-existing elements of the Third Party Intellectual Property, for the purposes described in this Agreement.
- 6) To the extent permitted by the Oregon Constitution and by the Oregon Tort Claims Act, Consultant shall be indemnified and held harmless by City from liability arising out of re-use or alteration of the Work Product by City which was not specifically contemplated and agreed to by the Parties in this Agreement.
- 7) Consultant may refer to the Work Product in its brochures or other literature that Consultant utilizes for advertising purposes and, unless otherwise specified, Consultant may use standard line drawings, specifications and calculations on other, unrelated projects.

C. Confidential Information

- 1)** Consultant acknowledges that it or its employees, Sub-Consultants, subcontractors or agents may, in the course of performing their responsibilities under this Agreement, be exposed to or acquire information that is the confidential information of City or City's residents. Any and all information provided by City and marked confidential, or identified as confidential in a separate writing, that becomes available to Consultant or its employees, Sub-Consultants, subcontractors or agents in the performance of this Agreement shall be deemed to be confidential information of City ("Confidential Information"). Any reports or other documents or items, including software, that result from Consultant's use of the Confidential Information and any Work Product that City designates as confidential are deemed Confidential Information. Confidential Information shall be deemed not to include information that: (a) is or becomes (other than by disclosure by Consultant) publicly known; (b) is furnished by City to others without restrictions similar to those imposed by this Agreement; (c) is rightfully in Consultant's possession without the obligation of nondisclosure prior to the time of its disclosure under this Agreement; (d) is obtained from a source other than City without the obligation of confidentiality; (e) is disclosed with the written consent of City; or (f) is independently developed by employees or agents of Consultant who can be shown to have had no access to the Confidential Information; or (g) is required to be disclosed by law, subpoena, or other court order.
- 2)** Consultant agrees to hold Confidential Information in strict confidence, using at least the same degree of care that Consultant uses in maintaining the confidentiality of its own confidential information, and not to copy, reproduce, sell, assign, license, market, transfer or otherwise dispose of, give, or disclose Confidential Information to third parties or use Confidential Information for any purposes whatsoever other than the provision of Services to City under this Agreement, and to advise each of its employees, Sub-Consultants, subcontractors and agents of their obligations to keep Confidential Information confidential. Consultant shall use its best efforts to assist City in identifying and preventing any unauthorized use or disclosure of any Confidential Information. Without limiting the generality of the foregoing, Consultant shall advise City immediately in the event Consultant learns or has reason to believe that any person who has had access to Confidential Information has violated or intends to violate the terms of this Agreement and Consultant will at its expense cooperate with City in seeking injunctive or other equitable relief in the name of City or Consultant against any such person. Consultant agrees that, except as directed by City, Consultant will not at any time during or after the term of this Agreement disclose, directly or indirectly, any Confidential Information to any person, except in accordance with this Agreement, and that upon termination of this Agreement or at City's request, Consultant will turn over to City all documents, papers, and other matter in Consultant's possession that embody Confidential Information.
- 3)** Consultant acknowledges that breach of this Section 4, including disclosure of any

Confidential Information, will give rise to irreparable injury to City that is inadequately compensable in damages. Accordingly, City may seek and obtain injunctive relief against the breach or threatened breach of this Section 4, in addition to any other legal remedies that may be available. Consultant acknowledges and agrees that the covenants contained herein are necessary for the protection of the legitimate business interests of City and are reasonable in scope and content.

5. Assignment/Delegation

Neither party shall assign or transfer any interest in or duty under this Agreement without the written consent of the other. If City agrees to assignment of tasks to a subcontractor, Consultant shall be fully responsible for the acts or omissions of any subcontractors. Any approval of a subcontractor does not create a contractual relationship between the subcontractor and City.

6. Consultant is Independent Contractor

- A.** The City's project director, or designee, shall be responsible for determining whether Consultant's work product is satisfactory and consistent with this Agreement, but Consultant is not subject to the direction and control of the City. Consultant shall be an independent contractor for all purposes and shall not be entitled to compensation other than the compensation provided for under Section 3 of this Agreement. The City's acceptance of the work product as satisfactory does not relieve the Consultant from responsibility for any errors in the work product.
- B.** Consultant is an independent contractor and not an employee of City. Consultant acknowledges Consultant's status as an independent contractor and acknowledges that Consultant is not an employee of the City for purposes of workers compensation law, public employee benefits law, or any other law. All persons retained by Consultant to provide services under this Agreement are employees of Consultant and not of City. Consultant acknowledges that it is not entitled to benefits of any kind to which a City employee is entitled and that it shall be solely responsible for workers compensation coverage for its employees and all other payments and taxes required by law. Furthermore, in the event that Consultant is found by a court of law or an administrative agency to be an employee of the City for any purpose, City shall be entitled to offset compensation due, or to demand repayment of any amounts paid to Consultant under the terms of the Agreement, to the full extent of any benefits or other remuneration Consultant receives (from City or third party) as a result of the finding and to the full extent of any payments that City is required to make as a result of the finding.
- C.** The Consultant represents that no employee of the City or any partnership or corporation in which a City employee has an interest, has or will receive any remuneration of any description from the Consultant, either directly or indirectly, in connection with the letting or performance of this Agreement, except as specifically declared in writing.
- D.** Consultant and its employees, if any, are not active members of the Oregon Public Employees Retirement System.

- E. Consultant certifies that it currently has a City business license or will obtain one prior to delivering services under this Agreement.
- F. Consultant is not an officer, employee, or agent of the City as those terms are used in ORS 30.265.

7. Indemnity

- A. The City has relied upon the professional ability and training of the Consultant as a material inducement to enter into this Agreement. Consultant represents to the City that the work under this Agreement will be performed in accordance with the professional standards of skill and care ordinarily exercised by members of the mechanical and electrical engineering professions under similar conditions and circumstances as well as the requirements of applicable federal, state and local laws, it being understood that acceptance of an Consultant's work by the City shall not operate as a waiver or release. Acceptance of documents by City does not relieve Consultant of any responsibility for design deficiencies, errors or omissions.
- B. Consultant shall defend, hold harmless and indemnify the City, its officers, agents, and employees from all claims, suits, or actions to the extent caused by the alleged negligent or otherwise wrongful acts or omissions of Consultant or its subcontractors, sub-Consultants, agents or employees under this Agreement. This indemnification does not extend to indemnification for negligent or otherwise wrongful acts or omissions of the City. If any aspect of this indemnity shall be found to be illegal or invalid for any reason whatsoever, the illegality or invalidity shall not affect the validity of the remainder of this indemnification.
- C. Consultant shall save and hold harmless the City, its officers, agents, and employees from all claims, suits, or actions and all expenses incidental to the investigation and defense thereof, to the extent caused by the professional negligent acts, errors or omissions of Consultant or its subcontractors, sub-Consultants, agents or employees in performance of professional services under this Agreement. Any design work by Consultant that results in a design of a facility that does not comply with applicable laws including accessibility for persons with disabilities shall be considered a professionally negligent act, error or omission.
- D. As used in subsections B and C of this section, a claim for professional responsibility is a claim made against the City in which the City's alleged liability results directly or indirectly, in whole or in part, from the quality of the professional services provided by Consultant, regardless of the type of claim made against the City. A claim for other than professional responsibility is a claim made against the City in which the City's alleged liability results from an act or omission by Consultant unrelated to the quality of professional services provided by Consultant.

8. Insurance

Consultant and its subcontractors shall maintain insurance acceptable to City in full force and effect throughout the term of this Agreement as detailed in this section. The insurance shall cover all risks arising

directly or indirectly out of Consultant's activities or work hereunder, including the operations of its subcontractors of any tier.

The policy or policies of insurance maintained by the Consultant and its subcontractors shall provide at least the following limits and coverages:

A. Commercial General Liability Insurance

Comprehensive General Liability Insurance covering Bodily Injury and Property Damage on an "occurrence" form with policy limits of at least per occurrence. This coverage shall include Contractual Liability insurance for the indemnity provided under this Agreement in an amount of \$2,000,000.

B. Professional Liability

Professional Liability Insurance covering any damages caused by an error, omission or any negligent acts. Combined single limit per claim shall not be less than \$1,300,000, or the equivalent. Annual aggregate limit shall not be less than \$2,000,000 and filed on a "claims-made" form.

C. Commercial Automobile Insurance

Commercial Automobile Liability coverage on an "occurrence" form including coverage for all owned, hired, and non-owned vehicles. The Combined Single Limit per occurrence shall not be less than \$1,300,000.

D. Workers' Compensation Insurance

The Consultant, its subcontractors, if any, and all employers providing work, labor or materials under this Agreement are subject employers under the Oregon Workers' Compensation Law and shall comply with ORS 656.017, which requires them to provide workers' compensation coverage that satisfies Oregon law for all their subject workers. Out-of-state employers must provide Oregon workers' compensation coverage for their workers who work at a single location within Oregon for more than 30 days in a calendar year. Consultants who perform work without the assistance or labor of any employee need not obtain such coverage.

E. Additional Insured Provision

The Commercial General Liability Insurance Policy shall include the City its officers, directors, and employees as additional insureds with respect to this Agreement. Coverage will be endorsed to provide a per project aggregate.

F. Extended Reporting Coverage

If any of the liability insurance is arranged on a "claims made" basis, Extended Reporting coverage will be required at the completion of this Agreement to a duration of 24 months or the maximum time period the Consultant's insurer will provide if less than 24 months. Consultant will be

responsible for furnishing certification of Extended Reporting coverage as described or continuous "claims made" liability coverage for 24 months following Agreement completion. Continuous "claims made" coverage will be acceptable in lieu of Extended Reporting coverage, provided its retroactive date is on or before the effective date of this Agreement. Coverage will be endorsed to provide a per project aggregate.

G. Notice of Cancellation

There shall be no cancellation, material change, exhaustion of aggregate limits or intent not to renew insurance coverage without 30 days written notice to the City. Any failure to comply with this provision will not affect the insurance coverage provided to the City. The 30 days' notice of cancellation provision shall be physically endorsed on to the policy.

H. Insurance Carrier Rating

Coverage provided by the Consultant must be underwritten by an insurance company deemed acceptable by the City. The City reserves the right to reject all or any insurance carrier(s) with an unacceptable financial rating.

I. Certificates of Insurance

As evidence of the insurance coverage required by the Agreement, the Consultant shall furnish a Certificate of Insurance to the City. No Agreement shall be effected until the required certificates have been received and approved by the City. The certificate will specify and document all provisions within this Agreement. A renewal certificate will be sent to the address below ten days prior to coverage expiration.

J. Primary Coverage Clarification

The parties agree that Consultant's coverage shall be primary to the extent permitted by law. The parties further agree that other insurance maintained by the City is excess and not contributory insurance with the insurance required in this section.

K. Copy of Policy or Certificate of Insurance

A cross-liability clause or separation of insureds clause will be included in the general liability policy required by this Agreement. Consultant shall furnish City with at least 30-days written notice of cancellation of, or any modification to, the required insurance coverages. A copy of each insurance policy, certified as a true copy by an authorized representative of the issuing insurance company, or at the discretion of City, in lieu thereof, a certificate in form satisfactory to City certifying to the issuance of such insurance shall be forwarded to:

Timothy Gross, PE
Director of Public Works/City Engineer
City of Newport
169 SW Coast Highway
Newport, Oregon 97365

Thirty days cancellation notice shall be provided City by certified mail to the name at the address listed above in event of cancellation or non-renewal of the insurance. The procuring of the required insurance shall not be construed to limit Consultant's liability under this agreement. The insurance does not relieve Consultant's obligation for the total amount of any damage, injury, or loss caused by negligence or neglect connected with this Agreement.

9. Termination without Cause

At any time and without cause, City shall have the right in its sole discretion, to terminate this Agreement by giving notice to Consultant. If City terminates the Agreement pursuant to this section, Consultant shall be entitled to payment for services provided prior to the termination date.

10. Termination with Cause

A. City may terminate this Agreement effective upon delivery of written notice to Consultant, or at such later date as may be established by City, under any of the following conditions:

- 1)** If City funding from federal, state, local, or other sources is not obtained and continued at levels sufficient to allow for the purchase of the indicated quantity of services. This Agreement may be modified to accommodate a reduction in funds.
- 2)** If Federal or State regulations or guidelines are modified, changed, or interpreted in such a way that the services are no longer allowable or appropriate for purchase under this Agreement.
- 3)** If any license or certificate required by law or regulation to be held by Consultant, its subcontractors, agents, and employees to provide the services required by this Agreement is for any reason denied, revoked, or not renewed.

Any termination of this agreement under paragraph (A) shall be without prejudice to any obligations or liabilities of either party already accrued prior to such termination.

B. City, by written notice of default (including breach of Agreement) to Consultant, may terminate this Agreement:

- 1)** If Consultant fails to provide services called for by this Agreement within the time specified, or
- 2)** If Consultant fails to perform any of the other provisions of this Agreement, or fails to pursue the work as to endanger performance of this Agreement in accordance with its terms, and after receipt of written notice from City, fails to correct such failures within ten days or such other period as City may authorize.

C. If City terminates this Agreement, it shall pay Consultant for all undisputed invoices tendered for services provided prior to the date of termination.

D. Damages for breach of Agreement shall be those allowed by Oregon law, reasonable and

necessary attorney fees, and other costs of litigation at trial and upon appeal.

11. Non-Waiver

The failure of City to insist upon or enforce strict performance by Consultant of any of the terms of this Agreement or to exercise any rights hereunder, should not be construed as a waiver or relinquishment to any extent of its rights to assert or rely upon such terms or rights on any future occasion.

12. Notice

All notices, bills and payments shall be made in writing and may be given by personal delivery, mail, or by fax. Payments may be made by personal delivery, mail, or electronic transfer. The following addresses shall be used to transmit notices, bills, payments, and other information:

IF TO CITY OF NEWPORT

Timothy Gross
Director of Public Works/City Engineer
City of Newport
169 SW Coast Highway
Newport, OR 97365
541-574-3366
t.gross@newportoregon.gov

IF TO CONSULTANT:

Brown and Caldwell, Inc.
6500 SW Macadam Ave., Suite 200
Portland, OR 97239

The date of deposit in the mail shall be the notice date for first class mail. All other notices, bills and payments shall be effective at the time of actual delivery. Changes may be made in the names and addresses of the person to whom notices, bills and payments are to be given by giving written notice pursuant to this paragraph.

13. Merger

This writing is intended both as a final expression of the Agreement between the parties with respect to the included terms and as a complete and exclusive statement of the terms of the Agreement. No modification of this Agreement shall be effective unless and until it is made in writing and signed by both parties.

14. Force Majeure

Neither City nor Consultant shall be considered in default because of any delays in completion and responsibilities hereunder due to causes beyond the control and without fault or negligence on the part of the parties so disabled, including but not restricted to, an act of God or of a public enemy, civil unrest, volcano, earthquake, fire, flood, epidemic, quarantine restriction, area-wide strike, freight embargo, unusually severe weather or delay of subcontractors or supplies due to such cause; provided that the parties so disabled shall within ten days from the beginning of such delay, notify the other party in writing of the cause of delay and its probable extent. Such notification shall not be the basis for a claim for additional compensation. Each party shall, however, make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon cessation of the cause, diligently pursue performance of its obligation under the Agreement.

15. Non-Discrimination

Consultant agrees to comply with all applicable requirements of federal and state statutes, rules, and regulations. By way of example only, Consultant also shall comply with the Americans with Disabilities Act of 1990, ORS 659.425, and all regulations and administrative rules established pursuant to those laws.

16. Errors

Consultant shall perform such additional work as may be necessary to correct errors in the work required under this Agreement without undue delays and without additional cost.

17. Extra Work

Extra work or work on Contingency Tasks is not authorized unless the City authorizes the additional or contingency work in writing. Failure of Consultant to secure written authorization for extra work shall constitute a waiver of all right to adjustment in the Agreement price or Agreement time due to unauthorized extra work and Consultant shall be entitled to no compensation for the performance of any extra work not authorized in writing.

18. Governing Law

The Agreement is subject to Oregon law. Any action or suits involving any question arising under this Agreement must be brought in the appropriate court in Lincoln County, Oregon.

19. Compliance with Applicable Law

Consultant shall comply with all federal, state, and local laws and ordinances applicable to the work under this Agreement, including but not limited to those set forth in ORS 279A, B & C. While all required contractual provisions are included in Exhibit C, Consultant shall be familiar with and responsible for compliance with all other applicable provisions of the Oregon Public Contracting Code.

20. Conflict Between Terms

This instrument shall control in the event of any conflict between terms between this document and the RFP and/or proposal.

21. Access to Records

City shall have access to the books, documents, papers and records of Consultant that are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts and transcripts.

22. Audit

Consultant shall maintain records to assure conformance with the terms and conditions of this Agreement, and to assure adequate performance and accurate expenditures within the Agreement period. Consultant agrees to permit City or its duly authorized representatives to audit all records pertaining to this Agreement to assure the accurate expenditure of funds.

23. Severability

In the event any provision or portion of this Agreement is held to be unenforceable or invalid by any court of competent jurisdiction, the validity of the remaining terms and provisions shall not be affected to the extent that it did not materially affect the intent of the parties when they entered into the Agreement.

24. Industrial Accident Fund Payment

Consultant shall pay all contributions or amount due the Industrial Accident Fund that Consultant or subcontractors incur during the performance of this Agreement.

25. Arbitration

All claims, disputes, and other matters in question between the City and Consultant arising out of, or relating to this Contract, including rescission, reformation, enforcement, or the breach thereof except for claims which may have been waived by the making or acceptance of final payment, may be decided by binding arbitration in City's sole discretion, in accordance with the Oregon Uniform Arbitration Act, ORS 36.600, et seq. and any additional rules mutually agreed to by both parties. If the parties cannot agree on rules within ten (10) days after the notice of demand, the presiding judge of the Lincoln County Circuit Court will establish rules to govern the arbitration.

A claim by Consultant arising out of, or relating to this Contract must be made in writing and delivered to the City Administrator not less than 30 days after the date of the occurrence giving rise to the claim. Failure to file a claim with the City Administrator within 30 days of the date of the occurrence that gave rise to the claim shall constitute a waiver of the claim. A claim filed with the City Administrator will be considered by the City Board at the Board's next regularly scheduled meeting. At that meeting the Board will render a written decision approving or denying the claim. If the claim is denied by the Board, the Consultant may file a written request for arbitration with the City Administrator. No demand for arbitration shall be effective until the City Board has rendered a written decision denying the underlying claim. No demand for arbitration shall be made later than thirty (30) days after the date on which the City has rendered a written decision on the underlying claim. The failure to demand arbitration within said 30 days shall result in the City Board's decision being binding upon the City and Consultant.

Notice of demand for arbitration shall be filed in writing with the other party to the agreement, subject to applicable statutes of limitation, except as set forth above. The City, if not the party demanding arbitration, has the option of allowing the matter to proceed with binding arbitration or by written notice within five (5) days after receipt of a demand for arbitration, to reject arbitration and require the Consultant to proceed through the courts for relief. If arbitration is followed, the parties agree that the award rendered by the arbitrators will be final, judgment may be entered upon it in any court having jurisdiction thereof, and will not be subject to modifications or appeal except to the extent permitted by Oregon law.

26. Attorney Fees

If suit, action or arbitration is brought either directly or indirectly to rescind, reform, interpret or enforce the terms of this contract, the prevailing party shall recover and the losing party hereby agrees to pay reasonable attorney's fees incurred in such proceeding, in both the trial and appellate courts, as well as

the costs and disbursements. Further, if it becomes necessary for City to incur the services of an attorney to enforce any provision of this contract without initiating litigation, Consultant agrees to pay City's attorney's fees so incurred. Such costs and fees shall bear interest at the maximum legal rate from the date incurred until the date paid by losing party

27. Complete Agreement

This Agreement and any exhibit(s) hereto and any and all Task Orders executed by the parties constitute the entire agreement between the parties. No waiver, consent, modification, or change of terms of this Agreement shall bind either party unless in writing and signed by both parties. Any waiver, consent, modification, or change if made, shall be effective only in specific instances and for the specific purpose given. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. In the event of a conflict between the documents comprising this Agreement, interpretation shall occur in the following manner: 1) each individual Task Order; 2) this Agreement and any exhibits hereto; and 3) the RFP and Response. The following exhibits are attached to and incorporated into this Agreement:


- A. Exhibit A – Consultant's Scope of Services Proposal
- B. Exhibit B – Consultant's Compensation NTE Estimate
- C. Exhibit C – Consultant's Project Schedule Proposal
- D. Exhibit D – Oregon Public Contracting Requirements

28. Miscellaneous

- A. Consultant agrees that news releases and other publicity relating to the subject of this Agreement will be made only with the prior written consent of City.
- B. Consultant shall comply with all virus-protection, access control, back-up, password, and other security and other information technology policies of City when using, having access to, or creating systems for any of City's computers, data, systems, personnel, or other information resources.
- C. Consultant will include in all contracts with subcontractors appropriate provisions as required by ORS 279C.580.
- D. Consultant will comply with environmental and natural resources regulations as set forth in ORS 279B.525 and regulations relating to the salvaging, recycling, composting or mulching yard waste material, and salvage and recycling of construction and demolition debris as set forth in ORS 279B.225 and 270C.510.

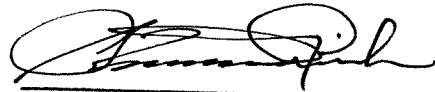
By their signatures hereunder, the parties acknowledge they have read and understand this Agreement and agree to be bound by its terms. This Agreement is effective on the date last signed below by a party below:

CITY OF NEWPORT:


Spencer Nebel, City Manager

Date: 10-03-16

Approved as to Form



City Attorney

Brown and Caldwell, Inc.:


Signature

Bryan K. Paulson / Vice President
Name & Title

Date: 9-29-16

Exhibit A

Scope of Services

Newport SE 3rd St Gravity Sewer Feasibility

The Scope of Services presented below describes the engineering services to be performed for the City of Newport's (City) SE 3rd St gravity sewer feasibility study. The City has requested the study for constructing a new gravity sanitary sewer pipe to allow for the removal of an aging pump station located at the end of SE 3rd Street.

Two options for a gravity sewer alignment have been identified:

- Option 1: Align the pipe parallel to the proposed Olson Creek storm sewer re-alignment in the same trench. This alignment would include installing new sanitary sewer pipe to the south of the pump station to SE 4th Street.
- Option 2: Route the pipe slightly south and then west along SE 3rd Street to SE Fogarty Street.

This feasibility study will require a survey of the existing topography, sanitary pipe and manholes, and other infrastructure, including water lines and storm sewer. The feasibility study will include development of a concept layout for the preferred alternative for presentation to City staff for concurrence. Following agreement by the City on feasibility and layout, Brown and Caldwell (BC) will prepare a scope and budget for the completion of 50%, 90%, and Final design submittal packages.

For the purposes of this scope and budget, the survey evaluation included in this feasibility study will also support final design.

Phase 1 Project Management

Objective	To provide management of engineering services in support of survey and feasibility study.
Activities	<p>Phase 1 includes the following activities:</p> <ul style="list-style-type: none">• Manage the schedule, budget, and scope.• Document meeting decisions and action items, assign activities to appropriate team members, and follow up to ensure timely resolution.• Monitor project progress, including work completed, work remaining, budget expended, and schedule.• Manage the quality control review of all work activities and project deliverables.• Prepare and submit a monthly invoice with invoice summary report.• Coordinate with sub consultants.
Deliverables	<p>The deliverables included in Phase 1 are summarized below:</p> <ul style="list-style-type: none">• Project schedule• Monthly invoices with work summary• Meeting notes, as required (to be submitted in electronic PDF format, up to two per month for the duration of the project)

Assumption A draft feasibility study will be presented within 2 months from the notice to proceed, pending availability of survey and geotechnical services.

Phase 2 Feasibility Support Services

Objective To provide geotechnical, survey, and permitting support services.

Task 001 Survey Services

Activities AKS Engineering & Forestry (AKS) will be contracted to survey the storm sewer, sanitary sewer, topography and necessary additional elements for the feasibility study and final design of the sanitary sewer re-route. Tasks include the following:

- Establish a permanent horizontal and vertical control network.
- Elevate the project to an approved vertical datum (NAVD 88).
- Establish approximate right-of-way (ROW) lines by locating existing monuments of record.
- Survey the sanitary sewer at SE 3rd St Pump Station, along SE 4th St between SSMHs 7312 and 7541, , and along SE Fogarty St between SSMHs 7537 and 7541. (to include rim, invert(s) in, invert out, type of pipe, size of pipe and direction of flow).
- Survey street features (curb, edge of pavement, crown, sidewalk, etc.), driveways, utilities including water, gas, power, telephone, cable, sanitary sewer, and storm sewer (including vaults, manholes with invert elevations, and other structures), and other key features, within the same limits as the topographic survey (see below).
- Prepare a topographic surface showing the following features: extent of wetland delineation, easements, approximate property lines, and 1-foot contours. Topography will extend from north of the existing pump station south to 4th Street and west, including all of the 4th Street ROW to SSMH 7540 as well as SE 3rd Street west of the pump station to Fogarty Street and Fogarty Street to SSMH 7537.
- Prepare a topographic map in AutoCAD format that can be used for design purposes.
- Provide traffic control, as needed, to accomplish the survey effort in accordance with the Oregon Temporary Traffic Control Handbook.
- Photograph of interior conditions of sanitary and storm manholes during survey data collection

Deliverables The deliverables included in Task 2.1 are summarized below:

- AutoCAD file of survey base file and base map

Assumptions The assumptions included in Task 2.1 are summarized below:

- City will pothole water and sanitary utilities as needed and coordinate with AKS to collect vertical survey data.
- City will secure any needed right-of-entry and/or permissions for survey crews to access survey locations.

Task 002 Environmental Services

Activities Pacific Habitat Services, Inc., will be contracted to perform field investigations to evaluate current environmental conditions and identify future environmental permitting needs related to the new sanitary sewer construction. These activities include the following:

- Flag any likely wetlands (official delineation to be included in a future Scope of Services, if necessary)
- Flag natural resources
- Conduct a soil and vegetation assessment
- Prepare a brief summary of natural resources within the potential project areas and expected permitting requirements, for inclusion in the feasibility study (Task 3.1).

Deliverables Written summary of findings.

Assumptions The assumptions included in Task 3.1 are summarized below:

- The natural resource impact area is limited to Olson Creek and the immediate vicinity.
- City will secure any needed right-of-entry and/or permissions for property access.

Task 003 Geotechnical Services

Activities Foundation Engineering, Inc. (FEI) will serve as the geotechnical engineer for the project. Work previously completed by FEI for the SE 4th Street Manhole project will supplement the additional exploration outlined below. FEI will conduct field explorations and other design-support activities that include the following:

- Perform subsurface exploration with hand auger, near Olson Creek, to identify soil properties and potential bedrock depth.
- The report entitled, *SE 4th Street Manhole Geotechnical Data Report (Foundation Engineering Inc., April 19, 2016)*, will be updated with construction guidance for the preferred alignment based on existing and new exploration data.

Deliverables The deliverables included in Task 003 are summarized below:

- Memorandum updating the existing geotechnical report.

Assumptions The assumptions included in Task 003 are summarized below:

- The City will coordinate and complete additional notification to neighboring properties, as needed.
- City will secure any needed right-of-entry and/or permissions for property access.
- No permits are expected to be required to complete this work.
- No traffic control is expected to be required to complete this work. If it is required, the City will supply lighted trucks, cones and/or signage.

Task 004 Geotechnical Services - Contingency

Activities Foundation Engineering, Inc. (FEI) will serve as the geotechnical engineer for the project. Work previously completed by FEI for the SE 4th Street Manhole project will supplement the additional exploration outlined below. FEI will conduct field explorations and other design-support activities that include the following:

- Perform subsurface exploration with a truck-mounted drill rig to an approximate depth of 30 feet. Sampling will occur at 2.5 to 5 foot intervals. Sampling will occur at the east and west end of 3rd Street.
- The report entitled, *SE 4th Street Manhole Geotechnical Data Report (Foundation Engineering Inc., April 19, 2016)*, will be updated with construction guidance for the preferred alignment based on existing and new exploration data.

Deliverables The deliverables included in Task 004 are summarized below:

- Memorandum updating the existing geotechnical report.

Assumptions The assumptions included in Task 004 are summarized below:

- The City will coordinate and complete additional notification to neighboring properties, as needed.
- City will secure any needed right-of-entry and/or permissions for property access.
- No permits are expected to be required to complete this work.
- No traffic control is expected to be required to complete this work. If it is required, the City will supply lighted trucks, cones and/or signage.
- Contingency work will be exercised upon approval, by City staff, to perform this work.

Phase 3 Sanitary Sewer Feasibility

Objective: Perform a feasibility study for a gravity sanitary sewer from the existing SE 3rd Street pump station.

Activities Task 3.1 includes the following activities:

- Perform a feasibility study of the two options, presented above, to determine the most appropriate alignment for the sanitary sewer re-route.
- Develop concept layout exhibits, depicting both route options.
- Coordinate and communicate with City staff via email.
- Prepare a brief Technical Memorandum (TM) outlining findings from the feasibility study. The TM will include summaries of the expected permitting needs and constructability considerations.

Deliverables The deliverables are summarized below:

- Draft and final TM outlining feasibility findings
- Two concept layout exhibits

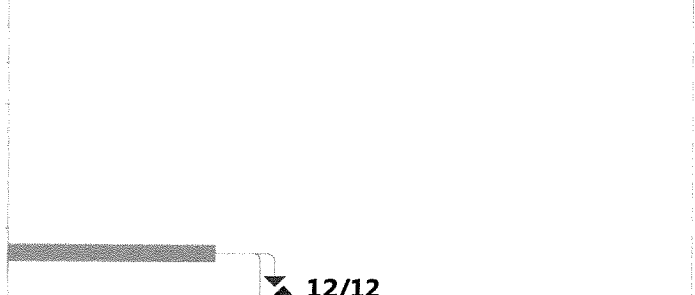
Assumptions The assumptions included in Task 3.1 are summarized below:

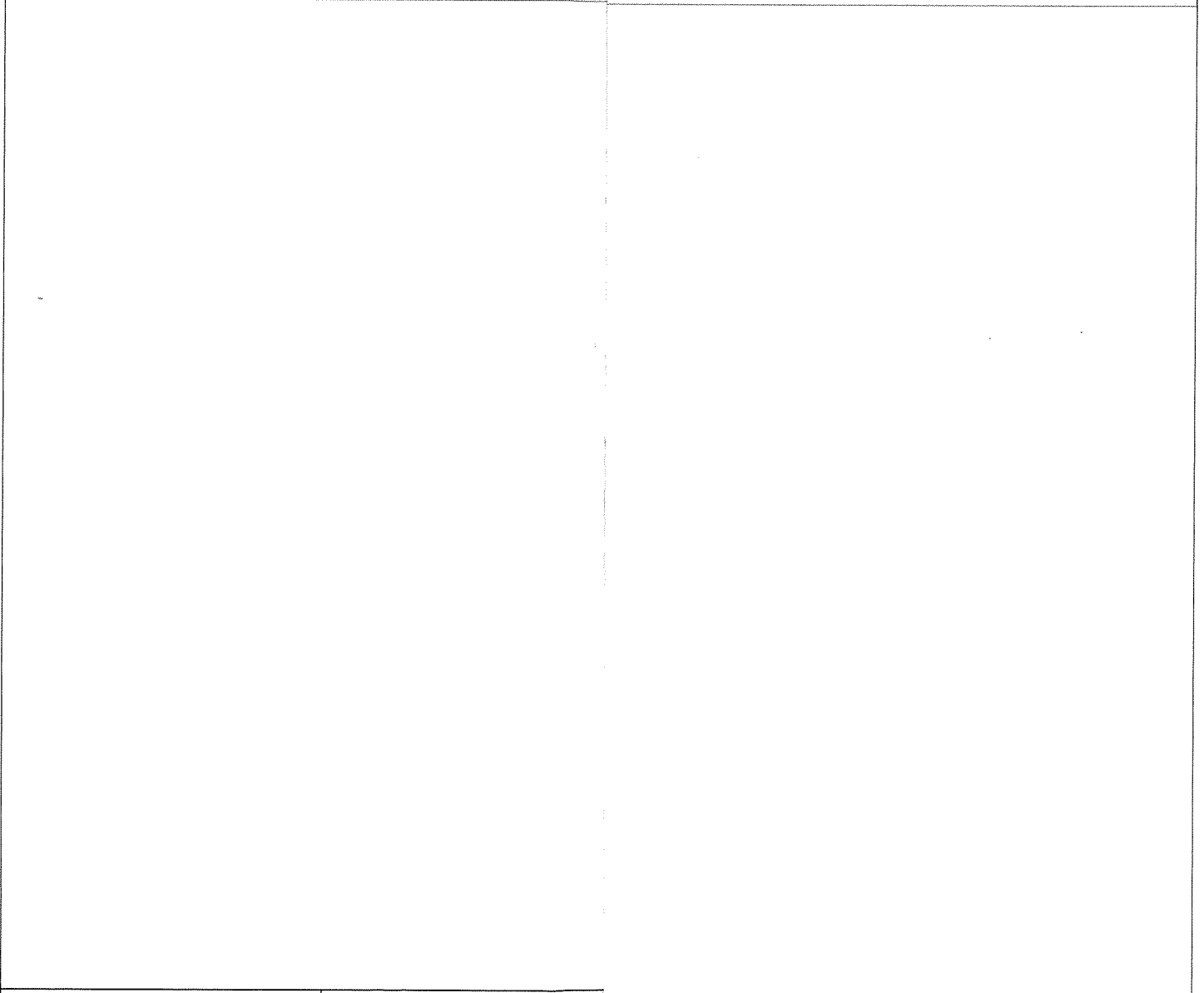
- Feasibility will be based on existing data provided by the City and data collected as part of this scope in Phase 2.

Exhibit B

Compensation

City of Newport -- Newport-Olson Crk SW																	
		Reizlaif	Ryan G	Rose	Lisa J	Whitty	Nathan S	Kowalczyk	Michael S	Pare	Wendy M	Romilly	David K	Vasquez	Jesus E		
Phase	Phase Description	PM	PA														
										Total Labor Hours	Total Labor Effort	APC	Cost	Cost	Cost	Total Sub Cost	Total Expense Effort
001	Project Management	\$168	\$91	\$124	\$91	\$106	\$168	\$91									
****	Default Task	24	2	0	0	0	1	6	33	\$4,928	\$264	\$0	\$0	\$0	\$0	\$0	\$264
		24	2	0	0	0	1	6	33	\$4,928	\$264	\$0	\$0	\$0	\$0	\$0	\$264
002	Feasibility Support Services	0	0	0	0	0	0	0	0	\$0	\$0	\$8,000	\$2,892	\$12,885	\$23,777	\$24,966	\$24,966
001	Survey Services	0	0	0	0	0	0	0	0	\$0	\$0	\$8,000	\$0	\$0	\$8,000	\$8,400	\$8,400
002	Environmental Services	0	0	0	0	0	0	0	0	\$0	\$0	\$0	\$2,892	\$0	\$2,892	\$3,037	\$3,037
003	Geotechnical Services	0	0	0	0	0	0	0	0	\$0	\$0	\$0	\$0	\$5,155	\$5,155	\$5,413	\$5,413
004	Geotechnical Services-Contingency	0	0	0	0	0	0	0	0	\$0	\$0	\$0	\$0	\$7,730	\$7,730	\$8,117	\$8,117
003	Sanitary Sewer Feasibility	15	0	10	24	4	2	0	55	\$6,704	\$440	\$0	\$0	\$0	\$0	\$440	\$7,144
****	Default Task	15	0	10	24	4	2	0	55	\$6,704	\$440	\$0	\$0	\$0	\$0	\$440	\$7,144
GRAND TOTAL		39	2	10	24	4	3	6	88	\$11,632	\$704	\$8,000	\$2,892	\$12,885	\$23,777	\$25,670	\$37,302

ID	Task Name	Duration	Start																
				'16	Dec 4, '16				Dec 11, '16			Dec 18, '16			Dec 25, '16				
				N	F	S	T	T	S	M	W	F	S	T	T	S	M	W	F
1	NTP/Project Kickoff	0 days	Mon 10/10/16																
2	Environmental Services	10 days	Mon 10/10/16																
3	Survey Services	15 days	Mon 10/24/16																
4	Geotchnical Services	15 days	Mon 10/17/16																
5	Project Milestone	0 days	Mon 11/14/16																
6	QA/QC	5 days	Mon 11/14/16																
7	Draft Memorandum	15 days	Mon 11/21/16																
8	Project Milestone	0 days	Mon 12/12/16																
9	City Review	10 days	Mon 12/12/16																
10	Final Memorandum	5 days	Mon 12/26/16																



Newport 3rd Street Pump Station Feasibility Date: 09/26/2016	Task		↓
	Split		_____
	Milestone		_____
	Summary		_____

EXHIBIT D

Oregon Public Contracting Requirements

**ORS CHAPTER 279B PUBLIC CONTRACTING REQUIREMENTS
FOR THE PURCHASE OF GOODS AND SERVICES**

- (1) Contractor shall pay promptly, as due, all persons supplying labor or materials for the prosecution of the work provided for in the contract, and shall be responsible for such payment of all persons supplying such labor or material to any Subcontractor. ORS 279B.220(1).
- (2) Contractor shall promptly pay all contributions or amounts due the Industrial Accident Fund from such Contractor or Subcontractor incurred in the performance of the contract. ORS 279B.220(2).
- (3) Contractor shall not permit any lien or claim to be filed or prosecuted against the Contracting Agency on account of any labor or material furnished and agrees to assume responsibility for satisfaction of any such lien so filed or prosecuted. ORS 279B.220(3).
- (4) Contractor and any Subcontractor shall pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.617. ORS 279B.220(4).
- (5) Contractor agrees that if Contractor fails, neglects or refuses to make prompt payment of any claim for labor or materials furnished to the Contractor or a Subcontractor by any person in connection with the contract as such claim becomes due, the City may pay such claim to the persons furnishing the labor or material and charge the amount of payment against funds due or to become due Contractor by reason of the contract. The payment of a claim in the manner authorized hereby shall not relieve the Contractor or his surety from his or its obligation with respect to any unpaid claim. If the City is unable to determine the validity of any claim for labor or material furnished, the City may withhold from any current payment due Contractor an amount equal to said claim until its validity is determined and the claim, if valid, is paid.
- (6) Contractor shall promptly, as due, make payment to any person, copartnership, association, or corporation, furnishing medical, surgical and hospital care or other needed care and attention, incident to sickness or injury, to employees of such Contractor, of all sums which the Contractor agrees to pay for such services and all monies and sums which the Contractor collected or deducted from the wages of employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service. ORS 279B.230(1).
- (7) All subject employers working under the contractor are either employers that will comply with ORS 656.017, or employers that are exempt under ORS 656.126. ORS 279B.230(2).
- (8) Contractor shall pay employees for overtime work performed under the contract in accordance with ORS 653.010 to 653.261 and the Fair Labor Standards Act of 1938 (29 USC 201, et seq). ORS 279B.235(3).
- (9) The Contractor must give notice to employees who work on this contract in writing, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location

frequented by employees, of the number of hours per day and the days per week that the employees may be required to work. ORS 279B.235(2).

- (10) All sums due the State Unemployment Compensation Fund from the Contractor or any Subcontractor in connection with the performance of the contract shall be promptly so paid. ORS 701.430.
- (11) The contract may be canceled at the election of City for any willful failure on the part of Contractor to faithfully perform the contract according to its terms.
- (12) Contractor certifies compliance with all applicable Oregon tax laws, in accordance with ORS 305.385.
- (13) Contractor certifies that it has not discriminated against minorities, women or emerging small business enterprises in obtaining any required subcontractors. ORS 279A.110.
- (14) As used in this section, "nonresident contractor" means a contractor that has not paid unemployment taxes or income taxes in the state of Oregon during the 12 calendar months immediately preceding submission of the bid for the contract, does not have a business address in this state, and stated in the bid for the contract that it was not a "resident bidder" under ORS 279A.120. When a public contract is awarded to a nonresident contractor and the contract price exceeds \$10,000, the contractor shall promptly report to the Department of Revenue on forms to be provided by the department the total contract price, terms of payment, length of contract and such other information as the department may require before the bidder may receive final payment on the public contract. ORS 279A.120.